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IN THE

Supreme Court of the United States

October Term, 1961

No. 649

MARGARET LAYNE, Executrix of the Estate of William J. Layne, Deceased,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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v.

UNITED STATES OF AMERICA.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Margaret Layne, Executrix of the Estate of William J. Layne, Deceased, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on October 16, 1961.

OPINIONS BELOW

The Opinion of the District Court for the Southern District of Indiana, Indianapolis Division, is reported at 190

Fed. Supp. 532. The Opinion of the Court of Appeals for the Seventh Circuit is as yet unreported.

Such opinions are appended hereto. (App. pp. 1 and 7.)

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was made and entered into on the 16th day of October, 1961. (App. p. 20.) The petition for rehearing was denied on the 3rd day of November, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

The instant case presents the following questions:

1. Whether an action exists under the Federal Tort Claims Act for the death of an unactivated National Guardsman caused by the negligence of a civilian federal employee.

2. Whether an unactivated State National Guardsman or his personal representative is barred from recovery under the Federal Tort Claims Act by receipt of certain statutory death benefits.

STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED

The pertinent portions of the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2674; 10 U.S.C. 8079, 8495, 8499; 32 U.S.C. 101, 301, 715; and 38 U.S.C. 331, 401, 416(b)(1)(2), 417, are set forth in the Appendix at pp. 21-28.

STATEMENT OF THE CASE

This action was brought under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2674, by Petitioner to recover dam-

ages for the wrongful death of William J. Layne, deceased. Upon motion by the Respondent, United States of America, the District Court granted summary judgment in favor of Respondent. The Court then overruled Petitioner's timely motion to alter or amend the judgment and for a new trial. The errors relied upon arise out of the granting of the motion for summary judgment.

The complaint is drawn in a single paragraph. (App. below, pp. 2-6.) The complaint alleges that Petitioner is the duly appointed and acting executrix of the Estate of William J. Layne, Deceased, and that the action is brought pursuant to the Federal Tort Claims Act. It alleges further that on July 2, 1959, the decedent was the pilot of an F-84 jet aircraft at Hulman Field, Terre Haute, Indiana; that the duty of operation and management of the control tower and the duty of supervising and operating the air navigational traffic and safety for persons rightfully using the airplanes and facilities, including Petitioner's decedent, had been assumed by the civilian employees of the Respondent. That the control tower and all of the facilities, safety devices, and instruments which were operable from said control tower were in the exclusive custody, control, and possession of the Respondent. That among said safety devices was a certain arresting barrier capable of preventing aircraft crashes by bringing aircraft encountering mechanical or operational failures on take-off to a safe stop. The complaint further alleges that Respondent by contract agreed to operate and raise said arresting barrier when requested and ordered to do so by pilots using said facilities. That on said date Petitioner's decedent attempted take-off in said aircraft; that the aircraft sustained a blow out to one of its tires; that said decedent immediately requested and ordered by radio message to Respondent's agents, servants, and employees in the control tower that

said safety barrier be raised; that the civilian agents, servants, and employees negligently failed and refused to raise said arresting barrier. That as a proximate result of such negligence, the airplane crashed and burst into flames, thereby causing the death of decedent and the resultant damage to Petitioner in the amount of Five Hundred Ninety-Five Thousand Dollars ($595,000.00), which amount is prayed for by Petitioner.

In its amended answer, Respondent denies the material allegations of the complaint and then alleges five (5) separate theories of defense: contributory negligence on the part of the decedent; Respondent was not responsible for the operation of the barrier; the acceptance of the barrier involved the exercise of a discretionary function; Petitioner's decedent assumed the risk involved; and that the receipt by Petitioner of certain statutory benefits under the Servicemen's and Veterans' Acts precluded relief under the Federal Tort Claims Act. (App. below, pp. 8-11.)

On October 20, 1960, Respondent filed its motion for summary judgment (App. below, pp. 11-14), which was sustained by the District Court by an opinion (App. p. 7), entered February 6, 1961.

A motion to alter or amend the judgment and for a new trial was filed February 13, 1961 (App. below, p. 37), which was denied on March 2, 1961. (App. below, pp. 37-38.)

REASONS FOR GRANTING THE WRIT

A State National Guardsman for the first time has been denied the right possessed by other citizens of the United States to sue their Government for a tort committed upon them by the civilian agents or employees of the Government. If this decision, which is one of first impression, is permitted to stand, the courts will have written a new exception to the

Federal Tort Claims Act. It will be an exception without need or reason. It will make "status" the test of liability and determine that a National Guardsman may be acting "incident to service" to the National Government, although such Guardsman is not in the service of the Federal Government. The long line of unbroken cases holding the Federal Government not to be liable for the acts of a State National Guardsman will have to be reappraised due to the fact that if there is sufficient "incident of service" or "status" to preclude a National Guardsman from suing the Federal Government, there would without question be sufficient "status" or "incidents of service" to permit recovery against the Federal Government for the actions of such Guardsmen. The holding of Federal courts in several circuits which recognize the fact of state control over such National Guard units is thus directly contravened. This is certainly another important aspect of the still undetermined extent of the Government's liability under the Federal Tort Claims Act, as was the case when this Court granted certiorari in *Indian Towing Co. v. United States*, 350 U.S. 61 (1955).

In addition, acceptance of statutory benefits by the personal representative of such a deceased National Guardsman should not and does not act as a waiver under the Federal Tort Claims Act, and to hold to the contrary is to refute the pronouncements and intentions of Congress as interpreted by this Court. Review of the lower court decisions is therefore amply warranted.

I. An unactivated State National Guardsman or his personal representative may recover for injuries or death caused by the negligence of a federal civilian employee.

The Federal Tort Claims Act, 28 U.S.C. 2674, is an all-

embracing and indiscriminate waiver of sovereign immunity to all persons. Unless, therefore, a claimant falls within one of the exceptions stated in 28 U.S.C. 2680, the action is maintainable. No contention has been advanced in this case that this Petitioner falls within any of the statutory exceptions. It is submitted, therefore, that this action must be resolved by an application of the "private person" liability standard established by the Act itself. By this standard the existence of a cause of action here is clear.

A. Fallacious basis of liability used by lower courts.

Both of the lower courts have denied relief in this case by creating a new and distinct test of liability from that established in the Act. This is referred to as "status" existing between the decedent and the National Government. In the consideration of the creation of this concept the lower courts have attached peculiar significance to several facts. First, the lower courts apparently consider important the taking of an oath by the decedent "to support and defend the National Constitution against all enemies, foreign and domestic, bear true faith and allegiance to it, obey the orders of the President of the United States of America. . . ." The fact that the taking of such an oath gives no "status" so as to preclude Tort Claims Act relief is apparent when it is recalled that all state judges in the United States, naturalized citizens, and many other individuals take a similar or even more inclusive oath.

Secondly, the lower courts seek comfort from Article I, Sec. 8 of the United States Constitution and Article 12 of the Indiana Constitution. Actually these provisions tend to refute, rather than support, the lower courts. They reflect the control of Guard activities, and thus the activities of

William J. Layne to be vested in the State of Indiana rather than the Federal Government.

Similarly important to the lower courts in the creation of this "status" concept was the receipt of pay by William J. Layne from the Federal Government. The courts have unanimously rejected this fact as not determinative of whether such a Guardsman is an employee or under the control of the Federal Government. If receipt of Federal pay stamps one with Federal "status" sufficient to preclude recovery under the Federal Tort Claims Act, then all persons operating under Federal grant-in-aid, subsidy, and benefit programs are likewise barred. The absurdity is apparent.

Reference is also made to the fact that William J. Layne "operated a jet plane of the United States of America and at the time in question had the direct duty to the United States of America to safeguard said plane even though he was executing at the same time commands of the State of Indiana." The duty of William J. Layne was no greater than the duty of any other bailee and his only liability in this regard was the withholding from his pay of the amount of any damages that might exist as a result of wilful or negligent operation.

The "dual relationship" or "status" theory adopted by the lowers courts is not novel. As recently as last year a plaintiff sought to predicate liability on the National Government for actions of a New Hampshire Air National Guard officer, on the theory that some sort of status existed similar to that adopted by the District Court in this case.

> *Leary v. United States*, 186 F. Supp. 953 (D.C. N.H., 1960)

It is worthy to note that far more incidents of "federalization" existed in the *Leary* case than exist here. In *Leary*,

the officer of the New Hampshire Air National Guard was on a training flight in conjunction with the New York National Guard when a crash occurred in Massachusetts. The purpose of the flight was to test the Air Defense Warning and Control facilities of the *United States* and was authorized by the National Guard Bureau, a federal agency. The court, however, disposed of the status question as follows:

> "The decisions are unanimous in supporting the conclusion that a member of a non-activated National Guard is not a federal employee. Citing authorities. This case requires no different conclusion even though the flight which resulted in the crash may have had certain federal aspects. The word 'employee' in the Tort Claims Act has no mystical or tergiverse meaning. The United States had no right to control the pilot's manner of flight. It is more in accord with the realities of military life to adopt the view that each serviceman is responsible, generally speaking, only to his superior in the chain of command. To say that an airman is sometimes an employee of the United States and sometimes of the National Guard and sometimes possibly an employee of both is to invite conflicting loyalties and shifting responsibilities. . . ."

Further, the effect of the lower courts' holding in creating a federal "status" concept is unusual, not only for the total want of judicial authority in support of their pronouncements, but also for the reason that the District Court readily conceded that Layne "was following the orders or commands of the State of Indiana." (App. p. 14.) In oral argument the Government conceded that William J. Layne was not acting under Federal orders or subject to their command at the time of his fatal flight. In the Government's briefs they have likewise conceded that he was acting under orders of the State of Indiana.

Petitioner submits that the creation of an "employment status" or "incident to federal service status" where none

existed here forms the very heart of the lower courts' error. It is submitted further that the type of action here is of the nature constituting the very reason for the enactment of the Federal Tort Claims Act itself. To deny relief is, in effect, to destroy the very purpose of the Act.

The lower courts have supplanted the "private person" liability test established by the Act and have, in fact, re written 28 U.S.C. 1346(b) so as to predicate liability on the existence or non-existence of a "status" between the injured person and the National Government, regardless of "private person" liability. The emasculation of the Act is complete. The fact that analogous "private person" liability exists here in the form of operation of the control tower can certainly not be doubted since the case of *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), where the court held that the control operation of a lighthouse on water was within the "like circumstances" provision in the Act. The *Indian Towing Co.* case involved navigational control operations on the water; this case involves those same operations in the air.

See also: *Eastern Air Lines, Inc. v. Union Trust Co., et al.; United States of America v. Union Trust Co., et al.*, 221 F. (2d) 62 (D. C. Cir. 1955), where the Government was held liable for negligent air navigational operations.

B. True test of liability under the Federal Tort Claims Act.

The existence or non-existence of "status" is not the standard of liability under the Act and consequently is not determinative of the instant case. It cannot be overemphasized that the criterion established by the Federal Tort Claims Act for liability on the part of the National Government is not "status," but rather the existence of analogous "private person" liability. It is, therefore, the

activity of the *tort feasor* which determines the applicability of the Act. This is made patently clear in *Feres v. United States*, 340 U.S. 135 (1950), where "private person" liability was lacking. The plaintiff in *Feres* bore a direct relationship not only to the Federal Government, but also to the *tort feasor* himself.

Petitioner respectfully submits that a comprehensive review of *Feres* and the many similar situations adjudicated thereafter conclusively establish the fact that before recovery will be denied under the Federal Tort Claims Act, the Government must establish *all* of the following facts:

1. The *tort feasor* must be performing activity having no civilian counterpart;

2. The plaintiff and *tort feasor* must have a direct relationship to each other concerning this activity; and

3. The injury must have occurred out of that relationship and incident to it.

Petitioner respectfully submits that not *a single one* of the above requirements exists in this case.

In regard to number 1, above, the *Feres* decision held that where one "is disabled in service by others in service" (340 U.S. 143), recovery could not be had under the Federal Tort Claims Act. The court held that the analogous "private person" liability required under the Act was lacking for the reason that the power to conscript a federal army is exclusively governmental.[1] However, in this case the exist

[1] It might be questioned where *Feres* is still the law insofar as it may require exact private person liability to exist. See: *Rayonier, Inc. v. United States*, 352 U.S. 315 (1957), where the court held that the fact that a private person might not have the right to engage in the activity causing the injury may not render the Government immune from liability. See also: *Indian Towing Co. v. United States*, 350 U.S. 61 (1955) and *United States v. Gavagan*, 280 F. (2d) 319 (5th Cir. 1960).

ence of analogous "private person" liability exists at numerous privately owned small airfields throughout the country.

Where the tort feasor is performing activity having a civilian counterpart, recovery is permitted regardless of the existence of "status."

Brooks v. United States, 337 U.S. 49 (1949);
United States v. Brown, 348 U.S. 170 (1954);
Lawrence v. United States, 193 F. Supp. 243 (D.C. Ala. 1961).

The second and equally important factor which must be found before liability is denied is that the plaintiff and the *tort feasor* must have a direct relationship and association to each other concerning the act performed by the *tort feasor*. In *Feres* and all other cases cited to the lower courts this relationship was characterized by a common employment or servitorial nature.

Jones v. United States, 249 F. (2d) 864 (7th Cir. 1957);
Lack v. United States, 262 F. (2d) 167 (8th Cir. 1958);
Buer v. United States, 241 F. (2d) 3 (7th Cir. 1957), *cert. den.* 353 U.S. 974.

The conclusion is inescapable that where this relationship between the plaintiff and the *tort feasor* (as distinguished from the United States Government) is lacking, recovery has without exception been granted. Thus, in *United States v. Brown*, 348 U.S. 170 (1954), the plaintiff was a veteran who was injured in a Veterans Hospital while being treated for a service-connected disability. The veteran and doctor treating him bore no relationship to each other, apart from the doctor-patient relationship, although the

plaintiff as a veteran necessarily occupied a "status" with the Federal Government sufficient to entitle him to the treatment. This Court held that such status between plaintiff and the National Government did not preclude recovery under the Act.

If "status" alone were controlling, then all men in active military service would be precluded from recovering under the Federal Tort Claims Act, even though they might at the time be on furlough or injured in a manner having no military connection. This is the very contention which was refuted in *Brooks v. United States*, 337 U.S. 49 (1949).

The importance of the status of the *tort feasor* and his relationship, if any, to the injured party is well illustrated by the cases of *Lack v. United States*, 262 F. (2d) 167 (8th Cir. 1958), *Jones v. United States*, 249 F. (2d) 864 (7th Cir. 1957), *Lawrence v. United States*, 193 F. Supp. 243 (D.C. Ala. 1961). In the first two cases the rule of *Feres* was applied to bar a federal prisoner from recovery against the Federal Government, based on negligent conduct of one having charge of his custody. The *Lawrence* decision, however, permitted recovery to such federal prisoner where the *tort feasor* was a federal employee having no such relationship to the plaintiff. The court in that decision, at 193 F. Supp. 245, stated:

> "While it is rational to conclude that in the sphere of private individuals there is no equivalent to the jailer-prisoner relationship, it is running a good principle into the ground to declare in terms of a categorical imperative that a federal prisoner, by virtue of his status alone, may not sue the United States under the provisions of the Federal Tort Claims Act *where his claim is based upon the alleged negligence of a federal employee completely disassociated from his status*. . . .

> Nothing in the rational or the holding of *Feres v. U. S.*, 340 U.S., 135, 71 S. Ct. 153, 95 L. Ed. 152, conceding that its vitality as an analogy to federal prisoner cases under the Tort Claims Act has not been impaired by *Rayonier, Inc. v. U.S.*, 352 U.S. 315, 77 S. Ct. 374, 1 L. Ed. 354, or *Indian Towing Co., Inc. v. U. S.*, 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48, sanctions such a rule cast in absolute terms." (Our emphasis)

This necessary relationship between the plaintiff and the *tort feasor* was the real motivation for the *Feres* case.

In *United States v. Brown*, 348 U.S. 170 (1954), the Supreme Court stated that the *Feres* case was based upon (a) the peculiar relationship of a federal soldier to his superior, the alleged *tort feasor*, (b) the effect of this type of action on military discipline, and (c) the extreme results possible if recovery could be had for negligent orders or acts committed by military persons in the course of their military duty. It is obvious that none of these reasons found in *Feres* exist here.

It is respectfully submitted that even if one were to concede the distortion of *Feres*, insofar as William J. Layne's status is concerned it would avail the Respondent nothing for the reason that analogous "private person liability" would still be lacking in *Feres*, but patently present in Layne.

In this case William J. Layne and the control tower operator bore no common employment or agency relationship to each other. There was no relationship of command, nor any custodial or servitorial status.

Thirdly, in order that a plaintiff be deprived of his cause of action the injury for which he seeks relief must have arisen out of and be incident to the relationship between the

plaintiff and the *tort feasor* who is performing his uniquely governmental activity. This is well established in *Brooks v. United States*, 337 U.S. 49 (1949). In that case the claimant was in active, federal, military, service when killed while on leave by the alleged negligence of a soldier operating an army truck. This Court permitted recovery, holding that the death did not arise out of the relationship, i.e., service between the deceased and the Army.

Servicemen are not, therefore, barred as such from recovery under the Federal Tort Claims Act.

Brooks v. United States, 337 U.S. 49 (1949);
Snyder v. United States, 118 F. Supp. 585, aff. 350 U.S. 906 (D.C. Md. 1953);
Knecht v. United States, 242 F. 2d 929, (3rd Cir. 1957);
Redding v. United States, 196 F. Supp. 871 (D.C. Ark. 1961).

Thus, even the unwarranted categorization of Layne as a federal militiaman determines nothing for the reason that the death was not incident to any relationship between Layne and the *tort feasor*. The *tort feasor's* civilian activity and the tort which resulted to decedent therefrom is completely opposite of the "incident to service" characterization of the *Feres* relationship between the claimant and his superior.

C. Non-existence of "status" sufficient to preclude relief.

It is only after consideration of factors completely distinct from status that this action can properly be determined.

1. Employer-employee.

The lack of an employer-employee relationship between the Federal Government and an unactivated National Guardsman under the Federal Tort Claims Act is universally established and admitted in the Government briefs filed below.[2]

57 A.L.R. 2d 1455;

Williams v. United States, 189 F. (2d) 607 (10th Cir. 1951);

Dover v. United States, 192 F. (2d) 431 (5th Cir. 1951);

McCranie v. United States, 199 F. (2d) 581, *cert. den.* 345 U.S. 922 (5th Cir. 1952);

Mackay v. United States, 88 F. Supp. 696 (D.C. Conn. 1949);

Glasgow v. United States, 95 F. Supp. 213 (D.C. N.D. Ala. 1951);

Elmo v. United States, 197 F. (2d) 230 (5th Cir. 1952);

Leary v. United States, 186 F. Supp. 953 (D.C. N.H. 1960).

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[2] The logic of the law is further extended by the fact that the state courts, in actions where such question was in issue, have uniformly held such Guardsman to be an employee of the state.

Cunningham v. State, 186 N.Y.S. (2d) 146 (Ct. Cl. 1959);
State v. Johnson, 186 Wis. 1, 202 N.W. 191 (1925);
Baker v. State, 200 N.C. 232, 156 S.E. 917 (1931);
Gibson v. State, 173 Misc. 893, 19 N.Y.S. (2d) 405;
Nebraska National Guard v. Morgan, 112 Nebr. 432, 199 N.W. 557 (1924);
Griffith v. National Guard, Military Dept., 70 Idaho 88, 212 P. (2d) 403 (1949);
Globe Indemnity Co. v. Forrest, 165 Va. 267, 182 S.E. 215 (1935);
Bianca v. Austin, 204 App. Div. 34, 197 N.Y.S. 328.

It is worthy also to notice that in Indiana, the situs of this action, the Attorney General of Indiana in "Opinions of the Attorney General of 1958," at page 153 held that members of the Indiana National Guard were ineligible for certain benefits given by statute in Indiana to members of the "Armed Forces" of the United States.

Typical of the above cases is the decision of *Williams v. United States*, 189 F. (2d) 607 (10th Cir. 1951), where the court stated on page 608, as follows:

> "At the time of the accident, the 279th Infantry had not been ordered into the active service of the United States. While, under the provisions of Sec. 58, supra, each unit was a reserve component part of the Army of the United States, and a potential part of such Army, not having been ordered into the active service of the the United States, it retained its status as a National Guard unit of the State of Oklahoma, and its members were servants of the state, not of the United States. This construction is supported by the adjudicated cases."

2. Government places itself in an inconsistent position.

As a result of the lower court decisions, the National Government has been granted immunity from liability because of a "status" between an Indiana Air National Guardsman and the National Government, although it at the same time escapes liability for injuries caused by such National Guardsman because of the lack of such a status.[3]

Thus, if we were to assume that Layne, in the operation of his plane, as he attempted to land negligently dropped an object on a farmer and then a few yards further was himself killed through the negligence of the control tower operator, the Government's inconsistent position would be apparent. In the first instance, it would contend that a complete lack of status, agency, or control existed over Layne's

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[3] The difference in result where an intervening sovereign is involved, for purpose of control, is well exemplified in *O'Toole v. United States* 206 F. (2d) 912 (3rd Cir. 1953), which held a District of Columbia Guardsman to be a federal employee under the Federal Tort Claims Act, due to the lack of such an intervening sovereign. In addition, that case held that the employment status between the District of Columbia Guardsman and the Federal Government *did not arise* "by virtue of Federal recognition of the Guard as a unit of the National Guard of the United States."

flight in denying liability, while in the control tower situation, seconds later, it would proclaim the very existence of status, dual relationship, and control.

3. Statutory determination of National Guardsman's status.

Historically, the various states have retained the right of control, training, planning, and providing for facilities of their respective National Guard units.

> *The Nation's National Guard*, National Guard Association of the United States, 1954, p. 22.

See article written by an attorney for the Claims Division of the Department of Justice admitting that control of National Guard activities is vested in the states. (6 Vand. L. R. 370.)

This is dramatically made apparent by a reading of the "mission" of the National Guard. It reads as follows:

> "To provide sufficient organization in each state so trained and equipped as to enable them to function efficiently at existing strength in protection of life and property and preservation of the peace, order, and public safety, *under competent orders of state authorities.*" (Our emphasis)
>
> *The Nation's National Guard*, National Guard Association of the United States, 1954, p. 9.

The fact that the control and regulation of unactivated National Guard units is vested in the States rather than the National Government is recognized and preserved by statute. These statutes reaffirm the proposition that *until activation*, a National Guard member is not on active duty nor subject to the rules and regulations applicable to his particular service. Thus, 10 U.S.C. § 8495 provides as follows:

> "Members of the Air National Guard of the United States are not in active Federal service except when ordered thereto under law. August. 10, 1956, c. 1041, 70A Stat. 524."

Authorization is given for the President to activate such Air National Guard Units by 10 U.S.C. § 8500.

It is also provided in 10 U.S.C. § 8499, reading as follows:

> "Members of the Air National Guard called into Federal Service, are from the time when they are required to respond to the call, subject to the laws and regulations governing the Air Force, except those applicable only to members of the Regular Air Force. Aug. 10, 1956, c. 1041, 70A Stat. 525."

Even more important, however, are the provisions contained in 10 U.S.C. § 8079, which specificially provides:

> "*When not on active duty, members of the Air National Guard of the United States shall be administered, armed, equipped, and trained in their status as members of the Air National Guard.* Aug. 10, 1956, c. 1041, 70A Stat. 496." (Our emphasis)

The status of the "Air National Guard," referred to in the above statute, is until activation clearly State and not Federal in nature. Thus, the Air National Guard is defined by statute as follows:

> "'Air National Guard' means that part of the organized militia *of the several States* and Territories. . . ." (Our emphasis)
> 32 U.S.C. § 101(6).

Until activation, members of the National Guard have no practical existence as a Federal entity, other than a potential one, *in futuro*.

It is undisputed in this case that neither William J. Layne nor the Indiana Air National Guard unit of which he was a member had been activated or ordered into federal service at any time in question here.

1. Feres and other decisions do not support a "status" theory sufficient to bar recovery.

The lower court, through the creation of a federal "status," has sought to invoke the *Feres* decision. A careful reading of the *Feres* case discloses that none of the vital elements necessary in order to deny recovery under the Federal Tort Claims Act are present in this case. Here, Layne was not disabled "in service by others in service." (340 U.S. 143) He not only was not in the service or employment of the United States, but, further, was killed as a result of the negligence of a *civilian* employee of a *civilian* agency of the Federal Government. The reason for the exclusion which prohibits one in service from suing the Federal Government because of the negligence of his service associates can have no effect in this case for the reason that Layne was not subject to any order of any officer of the United States, including the Commanding General of the United States Air Force. Furthermore, analogous "private person" liability does exist in this case, although it was completely absent in *Feres*. The only control over the activities of the decedent by the Respondent was, as stated, to withhold Federal funds or call him into active service. The latter power is a completely inert one. It has not been exercised and is not involved here. The *Feres* case is neither a bar to this action nor is it authority for the summary judgment here.

Justification for the "status" proposition is sought by the lower court in *Calloway v. Garber*, 289 F. (2d) 171 (9th Cir. 1961), and by claiming that a broader test is involved

in a determination of "incident to service" than is used to determine "scope of employment." Petitioner respectfully submits that neither the *Calloway* case nor the broadness of the "incident to service" test is in any way depositive of this case. If, as the lower court concedes the law to be, a National Guardsman is not an "employee," it is legally an impossibility for him to perform activities "incident to service," regardless of how broad the latter term is construed. The existence or non-existence of employment obviously is the broadest concept involved and necessarily would include the "scope of employment," "*respondeat superior*," and "incident to service" tests. One could be an employee, although he might at a particular time be either within or without any of those particular tests or concepts. *It is an inescapable corollary of this rule, however, that a non-employee could never be within the "scope of employment," "respondeat superior," or "incident to service" concepts.*

II. The receipt of certain statutory death benefits does not bar one from recovery under the Federal Tort Claims Act.

It is exceedingly difficult to determine whether or not the lower court actually adopts Respondent's contention that receipt of certain statutory benefits by Petitioner bar relief here. The lower court discusses the contention, but noticeably shies away from any direct pronouncement. This is easily understandable for the reason that all of the cases involving this question have held that the receipt of military and death benefits did not constitute an exclusive benefit nor preclude the recipient from Federal Tort Claims Act relief.

Brooks v. United States, 337 U.S. 49 (1949);
United States v. Brown, 348 U.S. 110 (1954);
19 A.L.R. (2d) 561;
68 A.L.R. (2d) 876.

This is true, even if the claimant is in active, federal, military service.

Brooks v. United States, 337 U.S. 49 (1949);

Archer v. United States, 217 F. (2d) 548, *cert. den.* 348 U.S. 953 (1955).

The language in the *Brooks* case, previously cited, is worthy of note in this regard. The court there stated, at page 53, as follows:

> "Provisions in other statutes for disability payments to servicemen, and gratuity payments to their survivors, 38 U.S.C.A., Sec. 701, 11 F.C.A., Title 38, Sec. 701, indicate no purpose to forbid tort actions under the Tort Claims Act. Unlike the usual workman's compensation statute, e.g., 33 U.S.C.A., Sec. 905, 10 F.C.A. Title 33, Sec. 905, there is nothing in the Tort Claims Act or the veterans' laws which provides for exclusiveness of remedy. . . ."

And, again, in the case of *United States v. Brown*, 348 U.S. 110, 99 L. Ed. 139 (1954), the court stated as follows on page 111:

> "The *Brooks case* held that servicemen were covered by the Tort Claims Act where the injury was not incident to or caused by their military service. 337 US 49, 52, 93 L ed 1200, 1203, 69 S Ct 918. In that case, servicemen on leave were negligently injured on a public highway by a government employee driving a

truck of the United States. *The fact that compensation was sought and paid under the Veterans Act was held not to bar recovery under the Tort Claims Act. We refused to 'pronounce a doctrine of election of remedies, when Congress has not done so.'* Id. 337 US at 53." (Our emphasis)

William J. Layne was, of course, not entitled to and did not receive federal compensation under the Federal Employees' Compensation Act. Similarly, no such benefits were received by his dependents or anyone on his behalf. The sole authority cited by the Respondent to the effect that Federal Tort Claims Act recovery might be precluded because of exclusive benefits provided elsewhere by statute involved the Federal Employees' Compensation Act and the receipt of benefits by federal employees. Of course, the reasoning fails at the outset since the decedent here was not a federal employee. It fails further for the reason that all of the authority is to the effect that no exclusion of remedies is provided by receipt of servicemen's benefits insofar as the Federal Tort Claims Act is concerned. There is an exclusionary provision in the 1958 Veterans' Benefit Act, relied upon so vigorously by the Government and the lower court, which does in fact provide that receipt of certain benefits under that Act is exclusive insofar as some other remedies are concerned, but notable, as far as this case is concerned, by its absence is any reference whatsoever to receipt of the benefits being exclusive as far as the Federal Tort Claims Act is concerned.

38 U.S.C. 416(b)(1)(2);
38 U.S.C. 417.

CONCLUSION

It is submitted that the lower court decisions in this case judicially create an exception to the Federal Tort Claims Act. They establish a criteria for the determination of liability, i.e., "status" of the injured person, contrary to the "private person" standard in the Act itself. The holdings, however, do more than emasculate the Tort Claims Act. They distort the *Feres* decision, which was characterized first by a lack of "private person" liability; secondly, by the fact that the *tort feasor* was the claimant's associate in military service; and, thirdly, by the fact that the claimant had a direct, active, and servitorial relationship to the National Government by applying such to a situation where the exact opposite of each of these factors existed.

Indeed, the lower court has done more than emasculate the Federal Tort Claims Act and distort *Feres*; it has pronounced a reactionary retreat to the concept of sovereign immunity from which modern legal and social history has so successfully escaped. Modern government has willingly and humanely liberalized the "king can do no wrong" concept and has, by various endeavors, provided a legal remedy to its constituents where the king, in fact, has done a wrong. It has required of the "king" the same conduct and responsibility that is demanded of the "subjects." One would not doubt for an instant the existence of liability here had this misfortune been caused by a "private person."

The Congressional declaration of a remedy for the torts of the sovereign is a meaningless utterance if its application may be judicially denied.

We submit that the relationship of the Government to its citizens, including State Guardsmen, is crucially important

to modern democratic government. This action will determine the progression or retrogression of that relationship. The direction which our law in this matter has taken is obvious. It must be maintained.

Respectfully submitted.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 649

MARGARET LAYNE, Executrix of the Estate of William J. Layne, Deceased,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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APPENDIX

OPINION OF THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 13318

October 16, 1961

Before Hastings, *Chief Judge*, and Knoch and Kiley, *Circuit Judges*.

Knoch, *Circuit Judge*. Plaintiff, Margaret Layne, Executrix of the Estate of William J. Layne, Deceased, sued under the Federal Tort Claims Act [Title 28, U.S.C.A. Sec. 1346(b)] to recover damages for his wrongful death.

The Complaint alleged that on July 2, 1959, the decedent, Major Layne, a member of the Indiana Air National Guard, while the pilot of an F-84-F jet fighter aircraft on a training flight, was fatally injured through the negligence of civilian employees of the United States at Hulman Field, Terre Haute, Indiana, where the control tower and all facilities, including safety devices operable from the control tower, were in the exclusive control of the United States, acting through its civilian employees.

The United States moved for summary judgment in its favor on the ground that Major Layne died from a service

connected disability incurred in the active air service of the United States in peacetime (for which Mrs. Layne was receiving compensation pursuant to the provisions of the Veterans' Benefits Act [Title 38 U.S.C.A. Secs. 101, et seq.]) which precluded recovery under the Federal Tort Claims Act. Affidavits, exhibits, and stipulations of the parties were submitted in support of and in opposition to this motion.

The District Court found no genuine issue as to any material fact, and granted the motion for summary judgment, in favor of the United States, from which Mrs. Layne took this appeal.

The pertinent facts may be summarized as follows: Major Layne was in the active service of the Indiana Air National Guard. Both the Guard and Major Layne, individually, were recognized by the United States as part of the reserve components of the United States military establishment, classified as "inactive service." At the time of the injury out of which this case arises, Major Layne was on a duty training flight.

Neither counsel, the District Court, nor this Court, have found any published decision relating to the right of a member of the National Guard to maintain an action against the United States under the Federal Tort Claims Act.

Members of the armed forces of the United States on active duty may not maintain an action against the United States under the Act. In *Feres v. United States* (1950), 340 U. S. 135, the Supreme Court said (at page 146):

> " " (T)he Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arose out of or are in the course of activity

> incident to service. Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law. We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence.

In a carefully reasoned opinion the learned District Judge traced the history of the National Guard in the United States, from the authority for its existence in the Constitution, Art. 1, Sec. 8 (1787), through its implementation in The National Guard Act, Title 32, U.S.C.A., the amended 1851 Constitution of the State of Indiana, Art. 12, Secs. 1-5, the Indiana Military Code, Chap. 187, Burns' Indiana Statutes, Secs. 45-1801 through 45-2805 (1953). From a close study of these Constitutions and statutes, the District Judge concluded that Major Layne held a dual legal relationship to the United States and to the State of Indiana at all pertinent times in question. Both Constitutions empower the United States and the State to create and maintain a National Guard and its personnel. Thus Indiana National Guard members may be in the "active" or "inactive" service of the respective State and National governments. The District Judge found that:

> Major Layne was a commissioned officer who took an oath of office prescribed by both the national and state laws to support and defend the National Constitution against all enemies, foreign and domestic, bear true faith and allegiance to it, obey the orders of the President of the United States, and that he would well and faithfully discharge the duties of his office. Major Layne was at the time in question a part of the reserve components of the defendant's military establishment. Major Layne qualified for and received a regular pay

allowance from the defendant under the said national laws. Title 31 U.S.C.A. 698. Major Layne was qualified for and his surviving dependents received the pension and other benefits under said national laws. Title 38 U.S.C.A. 101. With the foregoing factors and others prescribed in the said laws, it cannot be said that the term "Inactive Service" means that he was not in the service of the defendant at the time in question, even though he was at the time following the orders or command of the State of Indiana in his described dual relationship.

Plaintiff relies on a line of cases[1] which involve injured civilians who seek to recover under the Federal Tort Claims Act for negligence of National Guardsmen on inactive duty. The District Court distinguished these cases as holding that the United States is not responsible for the alleged negligent National Guardsmen under the rule of *respondeat superior* because in those cases the National Guardsmen were not employees of the United States.

We agree that the distinction is a valid one. In dealing with the two concepts the Ninth Circuit said:

> * * * (T)he test here is whether the injured serviceman was engaged in "activity incident to service"

[1] Plaintiff relies principally on *Williams* v. *United States* (10 Cir., 1951), 189 F. (2d) 607; *Dover* v. *United States* (5 Cir., 1951), 192 F. (2d) 431; *McCranie* v. *United States* (5 Cir., 1952), 199 F. (2d) 581; *MacKay* v. *United States* (D. C., Conn., 1949), 88 F. Supp. 696; *Glasgow* v. *United States* (D. C., N.D. Ala., 1951), 95 F. Supp. 213; *Leary* v. *United States* (D. C., N.H., 1960), 186 F. Supp. 953. Plaintiff also cites *Elmo* v. *United States* (5 Cir., 1952), 197 F. (2d) 230. In that case it was stipulated that the National Guardsman accused of negligence was also employed as a civilian unit caretaker of United States government property. The Court there held that in the capacity of caretaker the National Guardsman was a United States employee within the meaning of the Federal Tort Claims Act.

> at the time he was injured. That this is a much broader test than the "scope of employment" test used for *respondeat superior* purposes is clear from the facts of the *Feres* case itself and from the numerous circuit court cases which have interpreted and applied *Feres*. (Callaway v. Garber (9 Cir., 1961), 289 F. (2d) 171)

The cases cited by Plaintiff do not negative the dual relationship of a National Guardsman, who may at a given time be in the exclusive service of the State, or, as in the case before us, in the dual capacity of serving both United States and State governments.

The District Judge reasoned that:

> In this case, Major Layne at the time in question was performing limited service of the United States of America in a military status even though he was also executing at the same time the commands of the State of Indiana; received pay from the United States of America for the training flight in question even though he was executing at the same time the commands of the State of Indiana; operated a jet plane of the United States of America and at the time in question had the direct duty to the United States of America to safeguard such plane even though he was executing at the same time the commands of the State of Indiana; and his dependent survivors received pensions and other benefits by reason of his death occurring in a service-connected accident even though he was executing at the same time the commands of the State of Indiana. Under the said laws, Major Layne was not in the same non-service status with the United States of America as that of a non-military private citizen of this country. The fact that the United States of America was not exercising its entire power of command or control of Major Layne at the time in question does not remove or destroy the performance of service for and

> the status relationship the Major had with the United States of America, or it with the Major at the time in question. Nor does the fact that Major Layne's status is termed "Inactive Service" mean that he is not in or performing any service. The whole law must be read together to ascertain the meaning of such term which unerringly points to the service status of Major Layne and that in the line of duty, under these facts, (he) was injured and became a casualty incident to such service with the United States of America.
>
> Major Layne's accident occurred in the line of duty and incident to his service with the United States of America, * * *. *Feres v. United States of America, supra; Richard W. Buer v. United States of America*, 241 F. (2d) 3.

Plaintiff argues that the District Court erred in holding that receipt of federal statutory benefits precluded action under the Federal Tort Claims Act, citing *Brooks v. United States* (1949), 337 U. S. 49, 93 L. Ed. 1200; *United States v. Brown* (1954), 348 U. S. 110, 99 L. Ed. 139; *Archer v. United States* (1954), 217 F. (2d) 548. Neither *Brooks* nor *Brown* involved injuries incurred as an incident to military service. The benefits received in the instant case were predicated in part on a finding by the Veterans' Administration that Major Layne's death was service-connected. In *Archer*, the Court did say, at page 551:

> It is by no means established that the claim or acceptance of benefits under the statutes for service men and their dependents tends to establish a waiver or estoppel against pursuing a remedy under the Tort Claims Act, if *one existed*. (emphasis added)

But the Court in *Archer* concluded:

> The Trial Court was undoubtedly correct in holding

> that a cadet riding under military discipline on an army plane under control of a superior officer has no claim under the Act for injury sustained through whatever cause. This principle would not vary even though the service man were on leave and whether he were on the plane voluntarily or by command. He was in line of duty. Under such circumstances, his parents could not recover for his death. * * * Undoubtedly, under the situation disclosed by the record, plaintiffs have no right against the United States. * * * (T)he complaint did not state a cause of action or a claim upon which relief could be granted.

Other arguments advanced on behalf of plaintiff have been considered and found to be lacking in merit. The judgment of the District Court is AFFIRMED.

OPINION OF THE DISTRICT COURT

The defendant's Motion for Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure presents the issues.[2] The defendant offered affidavits and exhibits in support of the Motion and the plaintiff offered an affidavit, stipulations of the parties, and exhibits in opposition to the Motion.

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2 "MOTION FOR SUMMARY JUDGMENT

* * *, defendant herein moves the Court for summary judgment in its favor for the reason that plaintiff's decedent, William J. Layne, died from a service-connected disability incurred in the active air service of the United States in peacetime, for which the plaintiff is being compensated pursuant to the provisions of the Veterans' Benefits Act (Sections 101, et seq., Title 38, United States Code), which, in accordance with judicial precedent in such cases, precludes additional or further recovery by the plaintiff under the Federal Tort Claims Act for the same service-connected disability and death.

* * *."

Appendix

The plaintiff, administratrix of the estate of William J. Layne, deceased, brings this action based on the Federal Tort Claims Act, 28 U.S.C.A. 2671 et seq.[3] She alleges that

---

3 "COMPLAINT FOR DAMAGES

* * *.

3. That on the 2nd day of July, 1959, William J. Layne, deceased, was the pilot of a certain airplane, to-wit: F-84-F jet fighter, at Hulman Field, Terre Haute, Indiana.

4. That at all times mentioned herein, the duty of operation, management and control of the control tower at said Hulman Field, Terre Haute, Indiana, and the duty of supervising, operating and providing for air navigational traffic and safety for persons rightfully using the airplanes and facilities, both civilian and military, at said Hulman Field, Terre Haute, Indiana, and in particular said William J. Layne, deceased, had been entrusted to and assumed by said Defendant, and said Defendant had agreed to and did undertake said duties.

5. That at all times mentioned herein the control tower at said Hulman Field, Terre Haute, Indiana, and all of the facilities, safety devices, and instruments, including a certain safety barrier, which were operable from said control tower, were in the exclusive custody, control and possession of the Defendant, by and through its agents, servants and employees. That at all times mentioned herein, said agents, servants and employees of the Defendant were acting within the scope of their employment with said Defendant.

6. * * *. That said safety barrier was installed at the end of the runway at said Hulman Field as a safety device, for the protection and preservation of life and property, in such a manner that aircraft, which had experienced mechanical or operational failures on take-off attempts could be caught with said safety barrier and brought to a safe stop before crashing. That at all times mentioned herein, said safety barrier was capable of performing said functions and of bringing any such aircraft to a safe stop. That said Defendant agreed and covenanted to operate and raise said safety barrier when requested and ordered to do so by pilots using said facilities at Hulman Field, Terre Haute, Indiana, including said William J. Layne, deceased.

7. That on the 2nd day of July, 1959, and at approximately 5:45 P.M. on said date, said William J. Layne, deceased, attempted to take off from said runway at said Hulman Field, Terre Haute, Indiana, in the aforesaid airplane. That at said time and place and as said deceased was attempting the take-off, as aforesaid, said airplane sustained a blow-out to one of the tires, thereby causing said deceased to lose control of said airplane. That at said time, said deceased immediately requested and ordered that said safety barrier be raised and sent an

the United States of America is liable in damages to the estate for the use and benefit of certain dependent survivors of Major William J. Layne; that he was injured and died while in a training flight as a member of the Indiana Air National Guard which was proximately caused by the alleged negligent conduct of defendant's civilian employees in the operation of an air traffic control tower at Hulman Field, Terre Haute, Vigo County, Indiana.

The defendant's amended answer consists of five (5) defenses, the first (1st) and fifth (5th) of which are material to this Motion.[4] The first (1st) defense admits and

urgent appeal and order by radio to the agents, servants and employees of said Defendant in said control tower, for emergency aid, and specifically requesting the raising, use and operation of said safety barrier. That said Defendant, well knowing of the perilous situation of said William J. Layne, deceased, and after having received said urgent appeal, request, and order for use and operation of said safety barrier, negligently failed and refused to use or raise said safety barrier. That as a direct and proximate result of the negligence of the Defendant, the airplane which said William J. Layne, deceased, was then operating crashed and burst into flame, thereby causing the death of said William J. Layne, to Plaintiff's great damage.

8. * * *.

9. . That said William J. Layne departed this life, leaving his widow and two (2) minor sons, William Dean Layne and Jerry Lee Layne, surviving him, which widow and minor sons were wholly dependent on said deceased for support. That as a direct and proximate result of the negligence of the Defendant, the Plaintiff has been damaged in the sum of Five Hundred Ninety-Five Thousand ($595,000.00) Dollars.

* * *"

[4] "AMENDED ANSWER

Defendant, UNITED STATES OF AMERICA, * * *:

FIRST: * * *.

SECOND: Admits the allegations contained in paragraph numbered '3' of the complaint.

THIRD: Denies each and every allegation contained in paragraphs numbered '4', '5', '6', '7', * * *, and '9' of the complaint.

denies pertinent allegations of the complaint. The fifth (5th) defense alleges that the dependent survivors sought and obtained an award from defendant for dependency and indemnity compensation under the provisions of Title 38 U.S.C.A. 301 (The Servicemen's and Veteran's Benefit Act).

There is no genuine issue as to any material fact. Major Layne at all times in question was a member of and in the active service of the Indiana Air National Guard, assigned to the 113th Tactical Fighter Squadron based at Hulman Field, Vigo County, Terre Haute, Indiana. The Indiana Air National Guard and Major Layne at all times in question had met all the requirements for and were recognized by the United States of America as a part of the reserve components of its military establishment in a classification of "Inactive Service." Major Layne at the time in question was on a duty training flight. During the take-off, he met with an accident and subsequently died as a result of injuries incurred in the accident. Surviving dependents of Major Layne sought, were awarded, and received death pension and other benefits from the United States of

* * *
* * *
* * *
* * *

AS AND FOR A FIFTH SEPARATE AND COMPLETE DEFENSE

Plaintiff herein has previously made application to this defendant for dependency and indemnity compensation as the result of the death of her husband in this accident, and such compensation for service-connected injury and death has been awarded and paid to her pursuant to the provisions of the Servicemen's And Veteran's Benefit Act, 38 U.S.C. 301, et seq. The compensatory relief thus already provided plaintiff pursuant to statutory enactment precludes her further recovery in this action under the Tort Claims Act."

America as authorized by Title 38 U.S.C.A. 101(24) as a result of such happening in the course of such military service.

The Federal Tort Claims Act, Title 28 U.S.C.A. 2671 et seq., makes the United States of America liable for money damages for death caused by the negligent act or omission of any of its employees while they are acting within the scope of their office or employment or in the case of the military in line of duty under circumstances where the United States of America, if a private person, would be liable to such claimant under the law of the place the negligence occurred. The Act is compensatory in nature and is in no way punitive. Jurisdiction to hear such claims, pursuant to the Federal Tort Claims Act, is expended by authority of Title 28 U.S.C.A. 1346(b).

The United States Supreme Court has held that a member of the armed forces of the United States of America performing on active duty cannot maintain an action against the United States of America under the Federal Tort Claims Act. Feres v. United States of America, 340 U. S. 135, 71 Sup. Ct. 153, 95 L. Ed. 152. No published decision is known to the Court involving a National Guardsmen's claim under such Act.

The authority for the existence of the National Guard is in the 1787 Constitution of the United States of America. It provides in Article 1, Section 8:

> "The Congress shall have Power To * * * provide for the common Defence * * * of the United States, * * *; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress; * * *; and
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any department or Officer thereof."

Implementing such Constitution for the United States of America are the Acts of Congress being Title 32 U.S.C.A. (The National Guard Act). This code demonstrates the relationship of the National Guard of Indiana and its members with the United States of America.

Further authority for its existence is in the amended 1851 Constitution of the State of Indiana. It provides in Article 12:

> "Section 1. Organization.—The Militia shall consist of all able-bodied male persons, between the ages of eighteen and forty-five years, except such as may be exempted by the laws of the United States, or of this state; and shall be organized, officered, armed, equipped, and trained, in such manner as may be provided by law."
>
> "Section 2. Governor's Aids.—The Governor shall appoint the Adjutant, Quartermaster, and Commissary Generals."
>
> "Section 3. All militia officers shall be commissioned by the Governor, and shall hold their offices not longer than six years."

"Section 4. Division of Militia.—The General Assembly shall determine the method of dividing the militia into divisions, brigades, regiments, battalions and companies and fix the rank of all staff officers."

"Section 5. Sedentary and active.—The Militia may be divided into classes of sedentary and active militia, in such manner as shall be prescribed by law."

"* * * *"

Implementing the Constitution of the United States of America, Title 32 U.S.C.A. (The National Guard Act), and the Indiana Constitution is the Act of the Indiana General Assembly of 1953, Chapter 187 (Burns' Indiana Statutes, Sections 45-1801 through 45-2805), known as the Indiana Military Code. This code demonstrates the relationship of the National Guard of Indiana and its members with the United States of America.

From the said Constitutions and the laws of the United States of America and the State of Indiana, it is clear that Major Layne had a dual legal relationship to the United States of America and to the State of Indiana at the times in question. Both Constitutions charge the National and State Government respectively with the power to create and maintain the Indiana National Guard and its personnel. The Indiana National Guard and its members may be what is termed in the active or inactive service of the respective National and State Governments. The fact that Major Layne and the Indiana Air National Guard at the time in question were in the service of the State, and such was termed "Active Service," does not mean that they had no active duty relationship or status with the United States of America even though such was termed "Inactive Service," they were in the service of the United States of America limited though it may be.

Major Layne was a commissioned officer who took an oath of office prescribed by both the national and state laws to support and defend the National Constitution against all enemies, foreign and domestic, bear true faith and allegiance to it, obey the orders of the President of the United States, and that he would well and faithfully discharge the duties of his office. Major Layne was at the time in question a part of the reserve components of the defendant's military establishment. Major Layne qualified for and received a regular pay allowance from the defendant under the said national laws. Title 31 U.S.C.A. 628. Major Layne was qualified for and his surviving dependents received the pension and other benefits under said national laws. Title 38 U.S.C.A. 101. With the foregoing factors and others prescribed in the said laws, it cannot be said that the term "Inactive Service" means that he was not in the service of the defendant at the time in question, even though he was at the time following the orders or command of the State of Indiana in his described dual relationship.

It was not the intention of the Congress of the United States of America to grant to a guardsman on inactive duty all of the benefits of a serviceman on active duty in the armed forces of the United States of America plus the rights of a civilian under the Federal Tort Claims Act. In view of the holding in the Feres case, supra, denying a serviceman performing on active duty with the armed forces of the United States of America the right to recover damages under the Federal Tort Claims Act, if the foregoing intention of Congress were otherwise, it would place a guardsman in a better position than the serviceman on active duty. Congress recognized the guardsmen as being in

the service of the United States of America as limited by said laws and provided for their well being by awarding and by appropriations for pay allowances, gratuities, and pensions.

Personnel in the military service are in an honored calling performing the highest duty to their country. Theirs is not that of the relationship of master and servant known in the civil law, although some of the fundamentals of the two may be compared. Their service is within the meaning of the words "any employee" as used in the Federal Tort Claims Act. Major Layne was a commissioned officer and took an oath of office as herein explained.

Plaintiff vigorously contends that Major Layne was in the "Inactive Service" of the United States of America and while in such status was not an employee of the United States of America at the time in question and, therefore, Major Layne or his surviving dependents are entitled to the remedy of the Federal Tort Claims Act. Plaintiff cites the following authorities: Williams v. United States (10th Cir., 1951), 189 F. (2d) 607; Dover v. United States (5th Cir., 1951), 192 F. (2d) 431; McCrannie v. United States (5th Cir., 1952), 199 F. (2d) 581, certiorari denied, 345 U. S. 922; Mackay v. United States (Dist. Ct. Conn., 1949), 88 F. Supp. 696; Glasgow v. United States (D. C. N. D. Ala., 1951), 95 F. Supp. 213. These authorities do not decide whether or not a guardsman on active or inactive duty of the United States of America may use the remedy of the Federal Tort Claims Act. Generally, these cases involve an injured civilian seeking the Federal Tort Claims Act remedy against the United States of America for the negligence of a guardsman on inactive duty proximately causing such injuries. They hold in accordance with the master and serv-

ant rule of respondeat superior that the United States of America under the facts of those cases is not responsible for the conduct of the alleged negligent guardsmen because they were under the command of a separate distinct master, the State, at the time of the happening and then and there executing such commands. Such authorities might be precedent for the law of the case if this action was by an injured civilian against the defendant for damages caused by the negligence of Major Layne in the operation of the plane. While the question of law in this case may be partially lurking in the records of the cited authorities, neither brought to the attention of those courts nor ruled upon, such do not constitute precedents to be followed. Webster v. Fall, 266 U. S. 507, 45 S. Ct. Rep. 148. These cases do not negate a guardsman's dual relationship.

We must keep in mind that in these cases the alleged master, United States of America, had done no wrong. Liability was sought to be fixed on the master for the wrongs of its alleged servant whom it did not control and which servant was not executing the orders of such master when the tort occurred. Even the states who were the masters of the guardsmen in question in those cases would not be obligated if the guardsmen's wrong was committed outside the scope of his employment with those states. It is possible, depending on the facts, for a guardsman to be performing several duties for both the State and the National Governments, the joint performance of which may be the proximate cause of an incident injuring another in which event both State and Nation would be liable, if immunity had been waived, or the performance of such for the State could be the proximate cause but the simultaneous performance of such for the Nation may not be the proximate cause, in

which event the State would be liable if immunity had been waived and the Nation would not be liable.

It is also apparent that a guardsman at a given time, despite his dual relationship, may be in exclusive service of the State. For example, when the State is utilizing the guard for purely State functions of maintaining the peace and tranquility of its citizens during riots, floods and disorders. A guardsman under such circumstances may not be performing in the line of duty for the Federal Government. However, there has been a chipping away of the doctrine of these cases because of the factual circumstances presented by unit caretakers and administrative assistants of non-activated National Guard Units, even though members of the guard, they have been held to be civilian employees of the United States within the meaning of the Tort Claims Act on the basis of direct federal control of their activities in such employment: United States v. Holly, 192 F. 2d 221; Elnro v. United States, 197 F. 2d 230; United States v. Wendt, 242 F. 2d 854; Watt v. United States, 123 F. Supp. 106. The case of Courtney v. United States, 230 F. 2d 112, involved a unit caretaker conceded to be a federal employee although being hired by the state who controlled his rate of pay and hours of work. Judge Hinks, Second Circuit Judge, in speaking for the majority stated:

> "Whether he was an 'employee of the government' is wholly a federal question based on federal statutory interpretation. 28 U.S.C.A. 1346(b), 2671. Consequently his status under New York law is irrelevant. Moreover, we know of no rule of law that service to federal and state government is incompatible or that one cannot be an 'employee' for some and not for other purposes."

In this case, Major Layne at the time in question was performing limited service of the United States of America

in a military status even though he was also executing at the same time the commands of the State of Indiana; received pay from the United States of America for the training flight in question even though he was executing at the same time the commands of the State of Indiana; operated a jet plane of the United States of America and at the time in question had the direct duty to the United States of America to safeguard such plane even though he was executing at the same time the commands of the State of Indiana; and his dependent survivors received pensions and other benefits by reason of his death occurring in a service-connected accident even though he was executing at the same time the commands of the State of Indiana. Under the said laws, Major Layne was not in the same non-service status with the United States of America as that of a non-military private citizen of this country. The fact that the United States of America was not exercising its entire power of command or control of Major Layne at the time in question does not remove or destroy the performance of service for, and the status relationship the Major had with the United States of America, or it with the Major at the time in question. Nor does the fact that Major Layne's status is termed "Inactive Service" mean that he is not in or performing any service. The whole law must be read together to ascertain the meaning of such term which unerringly points to the service status of Major Layne and that in the line of duty, under these facts, was injured and became a casualty incident to such service with the United States of America.

Major Layne's accident occurred in the line of duty and incident to his service with the United States of America, therefore the holding in the case of Brooks v. United States

of America, 337 U. S. 49, 69 S. Ct. 918, 93 L. Ed. 1200, cited by the plaintiff is not authority for this case. Feres v. United States of America, supra; Richard W. Buer v. United States of America, 241 F. 2d 3.

A reading of the entire laws in question points to the meaning of "Inactive Service" as actually being an active relationship between Major Layne and the United States of America as limited by his duties to the State at the time in question. For example: the plane which he was operating was the property of the defendant, Title 32 U.S.C.A. 710(a); if the plane was damaged through the negligence of Major Layne, he would have been obligated to reimburse the defendant from his military service pay by reason of the provisions of Title 32 U.S.C.A. 710 quoted in part with emphasis added:

> "Section 710 Reports of Survey.
>
> * * *
>
> (c) * * *. However, if it was lost, damaged, or destroyed through negligence, the money value of the property or the damage thereto shall be charged * * *; or (2) to the member to whom the loss, damage, or destruction is charged from *pay due him for duties performed in his status as a member of the National Guard.*
>
> * * *."

The italicized portion of the quoted status refers to the many duties placed upon Major Layne under the said laws as limited by his separate duties to the State of Indiana. "The pay due him," referred to in the italicized portion of the quoted statute, is the pay Major Layne received from the United States of America as compensation for his performance of said duties prescribed by the United States of America. It is unreasonable to suggest that the training of a

jet aircraft pilot, such as Major Layne, or the use of the jet aircraft in question, would be useful to the accomplishment of any mission for the State of Indiana, but solely for the United States of America's military establishment. The training flight of Major Layne involved a distinct relationship with and performance of a duty to the United States of America.

Major Layne was in the performance of military service of the United States of America as limited by said laws at the time in question and is precluded from the remedies of the Federal Tort Claims Act. Feres v. United States of America, supra, Richard W. Buer v. United States of America, supra.

This opinion is restricted to a consideration solely of the relationship of Major Layne to the Federal Government at the time of the training accident and any reference to other factual situations or circumstances have merely been hypothecated for this purpose and there has been no effort made to determine other relationships which Major Layne or any National Guardsmen for that matter might occupy at any given time.

The defendant is entitled to a judgment as a matter of law as the plaintiff has no cause of action under the Federal Tort Claims Act on the facts of this case. The Motion for Summary Judgment is sustained.

JUDGMENT
OF THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

October 16, 1961

Before

Hon. John S. Hastings, Chief Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED

28 U. S. C. Sec. 1346 (b):

> "(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 U.S.C. Sec. 2674. *Liability of the United States:*

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

"If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. June 25, 1948, c. 646, 62 Stat. 983."

10 U.S.C. Sec. 8079. *Air National Guard of United States: Status when not in Federal service:*

"When not on active duty, members of the Air National Guard of the United States shall be administered, armed, equipped, and trained in their status as members of the Air National Guard. Aug. 10, 1956, c. 1041, 70 A. Stat. 496."

10 U.S.C. Sec. 8495. *Air National Guard of United States: status*

"Members of the Air National Guard of the United States are not in active Federal service except when ordered thereto under law. Aug. 10, 1956, c. 1041, 70 A. Stat. 524."

10 U.S.C. Sec. 8499. *Air National Guard in Federal Service: status*

"Members of the Air National Guard called into Federal service are, from the time when they are required

to respond to the call, subject to the laws and regulations governing the Air Force, except those applicable only to members of the Regular Air Force. Aug. 10, 1956, c. 1041, 70 A. Stat. 525."

32 U.S.C. Sec. 101. *Definitions:*

"In addition to the definitions in sections 1-5 of title 1, the following definitions apply in this title:

* * *.

"(2) 'Armed forces' means the Army, Navy, Air Force, Marine Corps, and Coast Guard.

* * *.

"(6) 'Air National Guard' means that part of the organized militia of the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia, active and inactive that

"(A) is an air force;

"(B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution;

"(C) is organized, armed, and equipped wholly or partly at Federal expense; and

"(D) is federally recognized.

"(7) 'Air National Guard of the United States' means the reserve component of the Air Force all of whose members are members of the Air National Guard.

* * *.

"(12) 'Active duty' means full-time duty in the active military service of the United States. It includes such Federal duty as duty on the active list, full-time training duty, annual training duty, and attendance, while in the active military service, at a school

designated as a service school by law or by the Secretary of the military department concerned.

"• • •.

"Aug. 10, 1956, c. 1041, 70A Stat. 596; Sept. 2, 1958, Pub. L. 85-861, Sec. 2(1), 72 Stat. 1542."

32 U.S.C. Sec. 301. *Federal recognition of enlisted members*

"To be eligible for Federal recognition as an enlisted member of the National Guard, a person must have the qualifications prescribed by the Secretary concerned for the grade, branch, position, and type of unit or organization involved. He becomes federally recognized upon enlisting in a federally recognized unit or organization of the National Guard. Aug. 10, 1956, c. 1041, 70A Stat. 601."

32 U.S.C. Sec. 715. *Property loss; personal injury or death: activities under certain sections of this title*

"(a) Under such regulations as the Secretary of the Army or Secretary of the Air Force may prescribe, he or, subject to appeal to him, the Judge Advocate General of the armed force under his jurisdiction, if designated by him, may settle, and pay in an amount not more than $5,000 a claim against the United States for—

"(1) Damage to, or loss of, real property, including damage or loss incident to use and occupancy.

"(2) damage to, or loss of, personal propery, including property bailed to the United States or the National Guard and including registered or insured mail damaged, lost, or destroyed by a criminal act while in the possession of the National Guard; or

"(3) personal injury or death;

either caused by a member of the Army National Guard or the Air National Guard, as the case may be, while engaged in training or duty under section 316, 502, 503, 504, or 505 of this title or any other provision of law for which he is entitled to pay under section 301 of title 37, or for which he has waived that pay, and acting within the scope of his employment; caused by a person employed under section 709 of this title acting within the scope of his employment; or otherwise incident to noncombat activities of the Army National Guard or the Air National Guard, as the case may be, under one of those sections.

"(b) A claim may be allowed under subsection (a) only if—

"(1) it is presented in writing within two years after it accrues, except that if the claim accrues in time of war or armed conflict or if such a war or armed conflict intervenes within two years after it accrues, and if good cause is shown, the claim may be presented not later than two years after the war or armed conflict is terminated;

"(2) it is not covered by section 2734 of title 10 or section 2672 of title 28;

"(3) it is not for personal injury or death of such a member or a person employed under section 709 of this title, whose injury or death is incident to his service;

"(4) the damage to, or loss of, property, or the personal injury or death, was not caused wholly or partly by a negligent or wrongful act of the claimant, his agent, or his employee; and

"(5) it is substantiated as prescribed in regulations of the Secretary concerned.

"For the purposes of clause (1), the dates of the beginning and end of an armed conflict are the dates established by concurrent resolution of Congress or by a determination of the President.

"(c) Payment may not be made under this section for reimbursement for medical, hospital, or burial services furnished at the expense of the United States or of any State or the District of Columbia or Puerto Rico.

"(d) If the Secretary of the military department concerned considers that a claim in excess of $5,000 is meritorious and would otherwise be covered by this section, he may pay the claimant $5,000 and report the excess to Congress for its consideration.

"(e) Except as provided in subsection (d), no claim may be paid under this section unless the amount tendered is accepted by the claimant in full satisfaction.

"(f) In any case where the amount to be paid is not more than $1,000, the authority contained in subsection (a) may be delegated to any officer of the Army or the Air Force, as the case may be, who has been delegated authority under section 2733(g) of title 10 to settle similar claims.

"(g) Notwithstanding any other provision of law, the settlement of a claim under this section is final and conclusive.

"(h) In this section, 'settle' means consider, ascertain, adjust, determine, and dispose of a claim, whether by full or partial allowance or disallowance. Added Pub. L. 86-740, Sec. 1(1), Sept. 13, 1960, 74 Stat. 878."

38 U.S.C. Sec. 331. *Basic entitlement.*

"For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is the result of the veteran's own willful misconduct. Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1122."

38 U.S.C. Sec. 401. *Definitions*

"As used in this chapter—

"(1) The term 'basic pay' means the monthly pay prescribed by sections 232(a), 232(c), or 308 of Title 37, as may be appropriate, for a member of a uniformed service on active duty.

"(2) The term 'veteran' includes a person who died in the active military, naval, or air service. Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1126."

38 U.S.C. Sec. 416. *Dependency and indemnity compensation in cases of prior deaths.*

"• • •

"(b)(1) Whenever the widow of a veteran has been granted dependency and indemnity compensation by reason of this section, payments to her and to the children of the veteran shall thereafter be made under this chapter, and shall not thereafter be made to them by reason of the death of the veteran under (A) other provisions of law administered by the Veterans' Ad-

ministration providing for the payment of compensation or pension, or (B) the Federal Employees' Compensation Act.

"(2) Whenever the child or parent of any veteran is granted dependency and indemnity compensation, payments shall not thereafter be made to such child or parent by reason of the death of the veteran under (A) other provisions of law administered by the Veterans' Administration providing for the payment of compensation or pension, or (B) the Federal Employees' Compensation Act."

38 U.S.C. Sec. 417. *Restriction on payments under this chapter*

"(a) No dependency and indemity compensation shall be paid to the widow, children, or parents of any veteran dying after April 30, 1957, having in effect at the time of death a policy of United States Government life insurance or National Service Life Insurance under waiver of premiums under section 724 of this title, unless waiver of premiums on such policy was granted pursuant to the first proviso of section 622(a) of the National Service Life Insurance Act of 1940, and the death occurs before the veteran's return to military jurisdiction or within one hundred and twenty days thereafter. Where dependency and indemnity compensation is not payable by reason of the preceding sentence, death compensation may be paid under section 321 or 341 of this title, as applicable.

"(b) No person eligible for dependency and indemnity compensation by reason of any death occurring after December 31, 1956, shall be eligible by reason of such death for any payments under (1) provisions of law administered by the Veterans' Administration providing for the payment of death compensation or death pension, or (2) the Federal Employees' Compensation Act. Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1132."

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

The motion of the defendant for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure having been presented, all responsive pleadings thereto having been filed, oral argument thereon having been had, supplemental briefs of the parties having been filed, and the Court being fully advised in the premises.

The Court finds that the defendant is entitled to a summary judgment as a matter of law.

It is Therefore Ordered, Adjudged and Decreed that the defendant's motion for summary judgment be, and the same hereby is, granted, that the plaintiff have and recover nothing by her suit, that costs herein be assessed against the plaintiff.

ENTRY OF THE UNITED STATES DISTRICT COURT

March 2, 1961

The plaintiff's Motion to Alter or Amend Judgment And For A New Trial is denied in view of the memorandum opinion sustaining defendant's Motion for Summary Judgment.

This being a Summary Judgment Proceeding, the Court could not weigh the evidence to determine whether or not the proximate cause of the accident was the result of the alleged negligence of the defendant's civilian airport personnel or the preceding blownout tire on the aircraft.

Major Layne's injuries and resultant death were a direct result of an incident of his service as a National Guardsman to the United States of America. He was under orders to

comply with all airport control and directions in the operation of the National Guard F-84-F type Jet. By order of the Commander of the Air Force, all military personnel were obligated to shift all matters of air navigational control to Federal civilian authorities who are also under command of the President of the United States of America.

Inasmuch as such civilian control over military aircraft was ordered and Major Layne was obeying the orders of his superiors, such control could only be incident to his service. Both the military personnel and the civilian authorities have the same master, the President of the United States of America or his delegates. Feres v. United States (1950), 340 U. S. 135, 95 L. Ed. 152, is authority for the Court's ruling denying plaintiff relief for damages incurred incident to military service.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 649

MARGARET LAYNE, EXECUTRIX OF THE ESTATE OF WILLIAM J. LAYNE, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH DISTRICT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 7–20; R. 22–36) is reported at 190 F. Supp. 532.[1] The opinion of the court of appeals (Pet. App. 1–7) is reported at 295 F. 2d 433.

JURISDICTION

The judgment of the court of appeals (Pet. App. 20–21) was entered on October 16, 1961. A timely

[1] "Pet. App." refers to the appendix to the petition for certiorari. "R." refers to the appendix to petitioner's brief in the court of appeals, which has been filed as part of the record in this Court.

petition for rehearing was denied on November 3, 1961. The petition for a writ of certiorari was filed on January 8, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

A national guardsman died as a result of the crash of a military aircraft which he was piloting in the course of inactive duty military training. The question presented is whether his survivors may recover under the Federal Tort Claims Act for his death on the ground that the crash was allegedly caused by the negligence of federal employees.

STATUTE INVOLVED

The Federal Tort Claims Act provides in pertinent part as follows:

28 U.S.C. 1346(b):

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2674:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

STATEMENT

On July 2, 1959, Major William J. Layne was a member in active service of the Indiana Air National Guard, assigned to the 113th Tactical Fighter Squadron based at Hulman Field, Indiana (Pet. App. 10; R. 25). On that date, Major Layne, piloting an F–84–F jet fighter, attempted to take off from Hulman Field on a duty training flight (Pet. App. 10; R. 3, 26). During the take-off his aircraft blew a tire, crashed, and then caught fire. Major Layne subsequently died as a result of the injuries incurred in this accident (Pet. App. 10; R. 5–6, 26). Petitioner, Major Layne's widow and the executrix of his estate, alleged that his death had been caused by the negligence of federal employees who had been operating the air traffic control tower at Hulman Field. Specifically, it was charged that these employees failed to put into operation a "safety barrier" that would have brought Major Layne's aircraft to a safe stop (R. 3–5).

The Indiana National Guard, at the time of Major Layne's accident, had met all of the requirements for "Federal recognition" and, accordingly, held the status of a reserve component in the military establishment of the United States (Pet. App. 10; R. 25–

26). Following his death, petitioner filed an "Application for Dependency and Indemnity Compensation or Death Pension" with the United States Veterans Administration (R. 13). The Veterans Administration found that Layne had died while he was participating in inactive duty training pursuant to 32 U.S.C. 502, and that his death had been service-connected as contemplated by 38 U.S.C. 331 (R. 13). On the basis of these findings, petitioner was awarded Federal Dependency and Indemnity Compensation benefits of $186 per month under 38 U.S.C. 410(a) (R. 14). She also received, as a result of Major Layne's service-connected death, other benefits from the United States, including $3,000 representing the death gratuity provided by 32 U.S.C. 321.

Thereafter, petitioner brought this suit under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671, *et seq.*, to recover additional damages from the United States for Major Layne's death (R. 6). The government filed a motion for summary judgment on the ground that, under this Court's decision in *Feres* v. *United States*, 340 U.S. 135, a member of the military establishment could not maintain a suit under the Tort Claims Act for injuries incident to his military service (R. 11–12).

The district court granted the government's motion for summary judgment (Pet. App. 20; R. 36). After examining Major Layne's status as a national guardsman under the laws of the United States and of Indiana, the district court stated that "it is clear that

Major Layne had a dual legal relationship to the United States of America and to the State of Indiana at the times in question" (Pet. App. 13; R. 28). The district court went on to find (Pet. App. 17–18; R. 33):

> In this case, Major Layne at the time in question was performing limited service of the United States of America in a military status even though he was also executing at the same time the commands of the State of Indiana; * * * operated a jet plane of the United States of America and at the time in question had the direct duty to the United States of America to safeguard such plane even though he was executing at the same time the commands of the State of Indiana; and his dependent survivors received pensions and other benefits by reason of his death occurring in a service-connected accident even though he was executing at the same time the commands of the State of Indiana.

The court concluded that Major Layne's death had occurred as an incident to his military service with the United States, and that, accordingly, an action under the Tort Claims Act could not be maintained. The court of appeals agreed with the reasoning of the district court and affirmed the judgment.

ARGUMENT

This Court, in *Feres* v. *United States*, 340 U.S. 135, 146, held that the United States is not liable to servicemen under the Tort Claims Act for injuries that "arise out of or are in the course of activity incident to service." That holding precludes the instant suit, for Major Layne's death plainly arose out of activity

incident to his military service for the United States. Although he was at the time an employee of the State of Indiana, his death resulted while he was piloting a United States jet aircraft on duty training as a member of a reserve component of the United States armed forces.

The application of the rule of the *Feres* case is particularly appropriate here. Petitioner has already received administrative compensation for Major Layne's death, as the Veterans Administration found that his death was service-connected. In addition, the allowance of suits against the government by national guardsmen for injuries incurred in the course of their training would have serious consequences upon the maintenance of discipline and the training of reservists, and would subject the training programs to the conflicts and inconsistencies of various state laws. Both courts below correctly applied the *Feres* principle to the facts of this case, and there is no occasion for further review by this Court.

1. The decision of this Court in *Feres*, that a serviceman may not maintain a suit under the Tort Claims Act for injuries incident to military service, has been reaffirmed on several occasions. In *United States* v. *Brown*, 348 U.S. 110, 113, it was stated: "We adhere also to the line drawn in the *Feres* case between injuries that did and injuries that did not arise out of or in the course of military duty." See also *Johansen* v. *United States*, 343 U.S. 427, 432;

Indian Towing Co. v. *United States*, 350 U.S. 61, 69.[2] In light of Major Layne's relationship to the United States at the time of his death, there can be little doubt that the courts below were warranted in finding that his injury and subsequent death were in the course of activity incident to his military service for the United States.

It is clear that a member of a federally recognized Air National Guard unit, while undergoing inactive duty training, is an employee of a State and also is engaging in military service for the United States. Federally recognized Air National Guard units, under the applicable Congressional enactments, occupy a dual status. In one status, as the "Air National Guard," they are merely units of the organized militia of the States. 32 U.S.C. 101(6) (see Pet. App. 23). In the other status, as the "Air National Guard of the United States," they constitute a reserve component of the

[2] The courts of appeals have consistently applied the *Feres* rule to various situations involving military personnel who incurred injuries incident to military service. See *Zoula* v. *United States*, 217 F. 2d 81 (C.A. 5); *Archer* v. *United States*, 217 F. 2d 548 (C.A. 9), certiorari denied, 348 U.S. 953; *Preferred Insurance Company* v. *United States*, 222 F. 2d 942 (C.A. 9), certiorari denied, 350 U.S. 837; *Norris* v. *United States*, 229 F. 2d 439 (C.A. 2); *United States* v. *United Services Automobile Ass'n*, 238 F. 2d 364 (C.A. 8); *Orken* v. *United States*, 239 F. 2d 850 (C.A. 6); *Buer* v. *United States*, 241 F. 2d 3 (C.A. 7), certiorari denied, 353 U.S. 974; *Van Sickel* v. *United States*, 285 F. 2d 87 (C.A. 9); *Calla-way* v. *Garber*, 289 F. 2d 171 (C.A. 9), certiorari denied, 368 U.S. 874; *Healy* v. *United States*, 295 F. 2d 958 (C.A. 2).

United States Air Force. 32 U.S.C. 101(7) (see Pet. App. 23). While the latter force is in *active* federal service only when so ordered, 10 U.S.C. 8495 (see Pet. App. 22), and, although when not in such service, the units are subject to the commands of the State militia organizations, still the relationship linking the National Guard units and the individual guardsmen with the United States continuously exists.

This relationship is demonstrated by the statutory provisions relating to the National Guard. The Air National Guard has been described by Congress as "an integral part of the first line defenses of the United States." 32 U.S.C. 102. On appointment, an officer of the Air National Guard swears to obey the orders of both the President of the United States and the Governor of the State, 32 U.S.C. 312, and receives an appointment as a reserve officer in the grade that he holds in the Air National Guard, 10 U.S.C. 8351(a). The President has authority to prescribe regulations and issue orders necessary to organize, discipline, and govern the National Guard, 32 U.S.C. 110, and such regulations are prepared by a committee of Air Force and Air National Guard officers and submitted to the Secretary of the Air Force for his approval, 10 U.S.C. 8033. Substantial amounts of money are appropriated annually for support of the Air National Guard, 32 U.S.C. 106, 107, and it is issued armament, material, equipment, and supplies, which remain the property of the United States, 32 U.S.C. 701, 702.

Inspections of the Air National Guard units are made under the supervision of the Secretary of the Air Force to assure that each unit is taking care of its property, organized as prescribed, composed of members meeting the required qualifications, and properly uniformed, armed and trained; any unit found deficient in these respects may be deprived of federal recognition and benefits. See 32 U.S.C. 105, 108. The federal government has established standards that officers of National Guard units must meet if the units are to be federally recognized and receive federal benefits. 32 U.S.C. 105, 108, 305, 307, 323. Other federal statutory provisions dealing with the Air National Guard relate to the type of discipline and training, 32 U.S.C. 501; the amount of training, 32 U.S.C. 502; participation in exercises with the regular Air Force, 32 U.S.C. 503; schools for Air National Guard personnel, 32 U.S.C. 504; and pay for the training required, 37 U.S.C. 301.

The statutory provisions outlined above clearly establish a continuing relationship between the United States, on one hand, and the federally recognized Air National Guard units and their members, on the other. Major Layne was a member of one of these federally recognized units. When injured, he was piloting a jet plane, belonging to the United States, in military training, a drill prescribed by the provisions of 32 U.S.C. 502. Accordingly, he received pay, including an amount for hazardous duty, from the United States for the flight (Pet. App. 18; R. 33; 37 U.S.C. 301).

Since his death occurred during "inactive duty training," it was deemed a service-connected death for purposes of the Veterans' Benefit Act, and Major Layne's survivors received from the United States the same benefits that would have been awarded had he been killed on active duty with the regular Air Force. See 38 U.S.C. 101(24).

2. The reasons underlying this Court's decision in *Feres* v. *United States*, *supra*, as well as its holding, are fully apposite to the instant case. Here, as in *Feres*, we find militating against the maintenance of the suit: (1) the existence of an alternate administrative remedy provided by Congress; (2) the undesirable impact which permitting the bringing of tort suits would have on military discipline; and (3) the inappropriateness of subjecting the military relationship to dissimilar state laws.

As was emphasized by this Court in the *Feres* case (see 340 U.S. at 144), the federal government has given petitioner remedies other than the Federal Tort Claims Act. Congress has provided that a member of the Air National Guard, who suffers disability while engaged in training required or authorized by federal law, is entitled to the hospital benefits, pay and allowances, pensions, and other compensation provided by law for a member of the Regular Air Force. 32 U.S.C. 318. If he is killed in the course of such training, his burial expenses are borne by the United States, 10 U.S.C. 1481, 1482; his survivors are entitled to a death gratuity, 32 U.S.C. 321;

and his survivors are entitled to the dependency and indemnity compensation provided by the Veterans' Benefit Act with regard to service-connected death, 38 U.S.C. 101(2), 331, 410(a). Here, petitioner has received the compensation and death benefits because the Veterans Administration found that Major Layne's death was service-connected.

Congress has plainly sought to place the national guardsman in the same position as any other reservist of the United States armed forces. There can be no doubt that a suit under the Tort Claims Act could not be maintained to recover for injury or death suffered during duty training by a member of the Army, Navy, Air Force, or Marine Reserve. And there is no basis for petitioner's position that Congress wanted to give national guardsmen preferential treatment over other reservists in this regard, by providing them with the same benefits accorded other reservists and, in addition, the rights of a civilian under the Tort Claims Act.

One of the principal reasons underlying the rule of the *Feres* case, as pointed out by this Court in *United States* v. *Brown*, 348 U.S. 110, 112, was the effect of tort suits upon the government-soldier relationship and the maintenance of military discipline. This consideration is just as applicable to the training of national guardsmen as it is to training other soldiers. Even though the alleged tortfeasor in this case was a civilian employee of the government performing a role in the training activity, rather than a military employee, petitioner's allegations would still require an inquiry into military affairs if this suit were allowed.

Moreover, to permit suit under the Tort Claims Act for injuries incurred by officers of the National Guard, while engaged in military training, would subject such training to the conflicts and inconsistencies of state law. The federal government's responsibilities for such injuries would fluctuate with the varying laws of the fifty States. This is precisely the type of result that the *Feres* decision avoids (see 340 U.S. at 143).

3. Petitioner, in arguing that Major Layne was not at the time of the injury engaged in activity incident to military service for the United States, relies upon cases holding that, in particular factual situations, members of non-activated National Guard units were not "employees" of the United States.[3] Those cases, however, involve suits against the United States by third persons seeking to impose *respondeat superior* liability upon the federal government under the Tort Claims Act because of actions of national guardsmen. The decisions reject such liability on the ground that there existed no master-servant relationship between the United States and the guardsmen, since the United States had no general right to control their actions.

The fact that Major Layne may not, at the time of his accident, have been under the control of the United States for purposes of *respondent superior* does not mean that he was not performing military service for the United States within the contemplation of this Court's decision in *Feres*. Cf. *Callaway* v. *Garber*,

[3] See, *e.g.*, *Williams* v. *United States*, 189 F. 2d 607 (C.A. 10); *Dover* v. *United States*, 192 F. 2d 431 (C.A. 5); *McCranie* v. *United States*, 199 F. 2d 581 (C.A. 5).

289 F. 2d 171 (C.A. 9), certiorari denied, 368 U.S. 874. While the United States had no general right of control over his actions, Major Layne was in fact acting in a military capacity for the federal government, for which he was receiving federal pay. It is clear that Major Layne's activity at the time of the accident was incident to military service.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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